State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 08073-14

AGENCY DKT. NO. 2014 21059

ENGLEWOOD BOARD OF EDUCATION,

Petitioner,

v.

R.G. AND A.G ON BEHALF OF J.G.,

Respondent.

Margaret Miller, Esq. for petitioner (Weiner Lesniak, LLP, attorneys)

Michael Inzelbuch, Esq. for respondents

Record Closed: September 22, 2014 Decided: October 1, 2014

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In accordance with the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415, the Englewood Board of Education (the Board) filed a due process petition seeking to establish that it is no longer obliged to fund J.G.'s placement at the Sinai School, a private day program, under the terms of an October 2013 settlement agreement (the "stay put" issue). The Board additionally seeks to compel J.G.'s parents to present him for intake interviews at proposed alternative out-of-district placements.

The Board filed its petition of appeal on April 24, 2014, and filed an amended petition on or about July 7, 2014. The matter was pre-tried via telephone conference on July 31, 2014. At that time, I requested that the parties file pre-hearing memoranda. Upon my review of their submissions, I conferred with counsel informally via telephone on September 10, 2014, and indicated that the "stay put" issue should be decided before addressing the remaining issue presented by the pleadings. I moreover suggested to counsel that the "stay put" issue appeared ripe for summary decision, but that I would consider allowing testimony if counsel felt it necessary; counsel for respondents replied that he needed additional time to reflect on whether he wished to call witnesses. We agreed counsel would update me no later than September 12, 2014; at counsel for respondents' request, and with my consent, that timeline was extended to September 15, 2014. I conferred again with counsel on the record on September 15, 2014. Thereafter, via letter dated September 16, 2014, respondents' counsel advised that he did not wish to call witnesses. I left the record open to receive supplemental legal memoranda from counsel, which were filed on September 19, and 22, 2014. Oral argument on the "stay put" issue was conducted via telephone on September 22, 2014, at which time the record closed.

FINDINGS OF FACT

The salient facts are uncontroverted, and I **FIND**:

J.G. is a thirteen-year-old student who enrolled in the Englewood public schools in or about July 2012. He had previously been attending the Sinai School, a private school program located in River Edge, New Jersey. Upon his enrollment, J.G. was classified as eligible for special education services under the category "Other Health Impaired," (OHI), and the child study team (CST) proposed an IEP dated September 20, 2012. That IEP was rejected by J.G.'s parents, who subsequently filed for due process (OAL Dkt No. EDS 07298-13). The matter was settled, and the settlement approved via a decision dated October 28, 2013. Under the terms of the settlement, the Board agreed to reimburse the family for the non-sectarian costs attached to the Sinai placement for the 2012-2013 school year; and likewise agreed to pay the non-sectarian costs for the 2013-2014 school year.

As to J.G.'s educational program for the 2014-2015 school year, it was agreed that the Board, through its CST, would conduct psychiatric, neuropsychological, speech and language, occupational therapy and social evaluations, and that an IEP meeting would be conducted not later than December 15, 2013. The agreement goes on to state:

> 4. Should the parties not agree as to placement for the 2014-2015 school year, J.G.'s current placement shall remain via "stay put." (The cost for 2014-15 is $40,041.39)

The settlement agreement stipulated that it was "contingent upon approval by the Office of Administrative Law and [would] be incorporated into a Final Decision entered by the Office of Administrative Law." The October 28, 2013, decision approving the settlement found that the settlement was "consistent with the law."

In accordance with the settlement terms, J.G. continued his educational program at Sinai at partial Board expense. An evaluation planning meeting took place on October 17, 2013, and the evaluations outlined in the settlement were again agreed upon and conducted, together with a classroom observation. An Eligibility Conference was conducted on December 13, 2013, and again on December 17, 2013, at which time it was agreed that J.G. would be reclassified as Multiply Disabled (MD). J.G.'s mother signed the conference report, indicating her agreement with the change in classification. Immediately thereafter, the parties met to develop an educational program for J.G. for the 2014-2015 school year. A proposed IEP was presented by the CST, which recommended pull-out/resource room instruction in language arts, science and math, and in-class support in social studies. The IEP provided for mainstreaming opportunities in physical education and elective subjects. Related services were to include occupational therapy, counseling, group speech and language therapy, as well as transportation. The IEP proposed that this program take place at an appropriate out-of-district placement.

The parents did not agree to the proposed IEP, and a second IEP meeting took place on February 26, 2014. Amendments were made to the IEP language, but the

proposed program remained the same. Via email dated March 17, 2014, J.G.'s parents rejected the proposed IEP. It is uncontroverted that at no time to date, however, have they formalized their dissatisfaction with that IEP via the filing of formal request for mediation and/or due process. Even their March 17, 2014, email came more than fifteen days after the February 26, 2014, IEP meeting.

Respondents assert that the document presented to them did not constitute a fully formed IEP, because it did not specify an actual school placement. But having reviewed the document, I disagree. An IEP is a programmatic roadmap that describes the components of a student's educational plan. The IEP drives the selection of the actual school placement; it thus must be drafted prior to exploring and selecting the appropriate placement. To do otherwise would be putting the proverbial cart before the horse. In any event, respondents' argument is a bit disingenuous. Their email offers no explanation for their rejection of the IEP, but they obviously understood the parameters of the proposed program well enough to know that it might result in a placement other than Sinai. Why else would they have disputed that program via their March 2014 email? I **FIND** that the February 26, 2014, document was a proposed IEP.

Thereafter, Case Manager Sandra Carlisle offered to schedule visitations to proposed out-of-district placements. Carlisle came away from a telephone conversation with A.G. perceiving that the family was not open to exploring alternative placements, and Carlisle confirmed her impressions in a letter dated March 18, 2014. But via email dated March 18, 2014, J.G.'s mother indicated that she would like a list of the schools being suggested by the CST because she wanted to "explore all of [her] options." Accordingly, via letter dated March 26, 2014, Carlisle described the process typically used to identify an out-of-district placement, noting that a list of potential placements is developed collaboratively, records are released and intakes are conducted. She also offered some suggested placements, to include programs at several local public school districts.

Thereafter, in April 2014, the Board filed a petition for due process, alleging that the family was failing to cooperate with its efforts to secure an appropriate placement, and seeking authority to release records to these placements. Via email dated April 27,

2014, counsel for the family reacted to the filing of the due process petition by indicating that there "was some misunderstanding herein." He went on to state that "the parent(s)…are ready, willing and able to sit down and here [sic] the case manager's suggestions as to out-of-district placements and thereafter visit any and all programs suggested. Please have the case manager contact the parent(s) as to possible dates." Counsel's email also requested independent evaluations.

In response, the Board filed a separate petition for due process through which it sought to bar the request for independent evaluations, as required by N.J.A.C. 6A:14-2.7(b). The relief sought was granted by Administrative Law Judge Carol Cohen via decision dated June 4, 2014, after respondents failed to appear on the scheduled hearing date. Thereafter, records were sent to proposed placements, and A.G. visited several of the schools suggested by the CST. But the CST perceived an unwillingness to bring J.G. to the intake interviews necessary to complete the application process at these schools. The Team's perception in that regard was validated on June 15, 2014, when A.G. wrote to Carlisle that "…despite my best efforts and intentions I simply can't bring [J.G.] to visit any schools at this time." She attached letters from two physicians who opined that such visits were contraindicated by J.G.'s emotional fragility. A.G. asked that her son be permitted to remain at Sinai at Board expense. The amended petition of appeal followed.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

This dispute requires a determination of what the parties intended when they agreed that Sinai would be the "stay put" placement, in the event that they should "not agree as to placement for the 2014-2015 school year." (emphasis supplied) In interpreting this settlement agreement, general principles of contract interpretation apply.

Interpretation of a promise or agreement, or term thereof, is the ascertainment of its meaning. Restatement Second of Contracts, § 200 (1981). Our courts have held that, "a court must try to ascertain the intention of the parties as revealed by the language used, the situation of the parties, the attendant circumstances and the objects

the parties were striving to attain." Celanese Ltd. v. Essex Cnty. Improvement Auth., 404 N.J Super. 514, 528 (App. Div. 2009). Every part of the contract should be interpreted with reference to the whole and, if possible, be so interpreted as to give effect to its general purpose. Josefowicz v Porter, 32 N.J. Super. 585, 590 (App. Div. 1954), citing 3 Williston on Contracts(rev. ed. 1936) § 618, p. 1777 et. seq. Case law instructs that technical terms or words of art must be given their technical meaning, unless the context or local usage shows a contrary intention. Josefowicz v Porter, supra., at 590. A court should not make a better contract for either of the parties than the one they made themselves. Kampf v Franklin Life Ins. 33 N.J. 36, 43 (1960).

Moreover, this settlement was consummated with the assistance of an administrative law judge; was expressly contingent on obtaining judicial approval; and is incorporated into an administrative order approving the settlement as "consistent with law." Accordingly, my analysis of the contractual language must likewise remain mindful that this settlement resolves a dispute arising under the IDEA; as a result, its language must be interpreted in a manner consistent with the intent and spirit of that Federal enactment.

The parties resolved the 2012 due process petition filed by the parents by agreeing, quite clearly and unequivocally, that J.G. would attend the Sinai School during the 2012-2013 and 2013-2014 school years at partial Board expense. Their agreement as to these two years must be considered against the factual backdrop under which this case initially arose. In 2012, J.G. was a new enrollee about whom the CST knew little, and who ultimately never attended the public schools. By the time the matter was settled in October 2013, the 2012-2103 school year had passed, and the 2013-2014 school year was already underway. While the parties agreed that the Board would support the Sinai placement financially for these two years, they also clearly agreed that the CST would promptly commence the steps needed to truly "get to know" J.G. and his educational needs. They agreed that the CST would be afforded an opportunity to thoroughly evaluate J.G. A decision as to his placement for the 2014-2015 would be made thereafter. Consistent with the parties' intent, the agreement provided that an IEP meeting would take place "by December 15, 2013."

Accordingly, J.G.'s continued placement at Sinai during the 2014-2015 school year was to be the subject of further analysis and discussion. It was not a foregone conclusion. Respondents assert that the language in paragraph four of the agreement essentially gave them free reign to reject a proposed change in placement for 2014-2015; that they could do so at any time; for any reason; without the need to formalize their disagreement through the filing of a due process petition or request for mediation, and, in turn, have their son remain at Sinai at partial Board expense for the entirety of the 2014-2015 school year. But it is clear that such an interpretation of the language in paragraph four would give J.G.'s parents far more than they bargained for, and is unsupported by the contractual language.

Indeed, any such agreement would have expressly said so, with some language that might have read: "at their sole discretion, A.G. and R.G. may continue J.G. at the Sinai School at partial Board expense for the entire 2014-2015 school year."[1] But that plainly is not what the agreement says. Rather, it invites the parties to an IEP meeting at which the 2014-2015 school year would be discussed. Importantly, it schedules that meeting early in the 2013-2014 school year, seeking to create ample time to resolve any disputes about placement prior to the commencement of the 2014-2015 school year, so that the parties would be aware of their rights and obligations, and J.G.'s school placement could be determined prior to the commencement of his academic year.

The Board urges that paragraph four of the settlement agreement thus required that the parents formalize any dispute with the program proposed at the February 2014 IEP meeting through the timely filing of a formal petition for due process or mediation. Then and only then would they be entitled to the "stay put" protections incorporated in the settlement agreement.[2] I agree. Only by crystallizing their dispute promptly could the intent of the agreement be realized; that is, either an agreed upon placement for 2014-2015, or a timely judicial resolution to J.G.'s placement for 2014-2015. Since the

[1] The Board puts it another equally apropos way, noting that an agreement that would have allowed J.G. to continue at Sinai for the entire 2014-15 year would have omitted the phrase "stay put" altogether, and would have read: "Should the parties not agree as to placement for the 2014-2015 school year, J.G.'s current placement shall remain."

unfortunate reality is that, even with a timely filing, the matter might not have reached closure by September 2014, the agreement specified what the school placement in September 2014 would be in the interim, and who would pay for it until the litigation was concluded. But even under the most strained interpretation of the agreement's language, I cannot read it to provide that the parents can do nothing to formalize their disagreement with the program proposed for 2014-2015, and, through their inaction, guarantee payment at Sinai for an additional year. I thus agree with the Board that, by stating that placement in 2014-2015 would continue at Sinai "via stay put," the parties clearly contemplated the legal process that is embodied in statute and regulation.

My interpretation of the agreement's language is consistent with my obligation to interpret technical terms in accordance with their accepted meaning. "Stay put" are words of art generally understood in the world of special education to stand for the statutory and regulatory proposition that, as a general matter, no change will be made to a child's placement during the pendency of a formal special education dispute. This requirement is embodied in our local regulations at N.J.A.C. 6A:14-2.3(h), which provide that a district must provide written notice at least fifteen calendar days prior to the implementation of a proposed action. N.J.A.C. 6A:14-2.3(h)(3) then states:

> 3. The district board of education shall implement the proposed action after the opportunity for consideration has expired in (h)2 above unless:
>
> i. The parent disagrees with the proposed action and the district takes action in an attempt to resolve the dispute; or
>
> ii. The parent requests mediation or a due process hearing according to N.J.A.C. 6A:14-2.6 or 2.7. A request for mediation or a due process hearing prior to the expiration of the 15th calendar day in (h)2 above shall delay the implementation of the proposed action according to N.J.A.C. 6A:14-2.6(d)10 or 2.7(u).

N.J.A.C. 6A: 14-2.7(u) provides that, "[p]ending the outcome of a due process hearing, including an expedited due process hearing, or any administrative or judicial

[2] Indeed, the settlement document merely specifies which placement would constitute "stay put" in the event it needed to be invoked. While the law is clear that the status quo must be maintained during the pendency of a special education dispute, what constitutes the status quo can be unclear, at times.

proceeding, no change shall be made to the student's classification, program or placement unless both parties agree…" (emphasis supplied).

Thus, "stay put" is invoked only upon the filing of a formal petition for due process or mediation within fifteen days of notice of a change in program or placement. J.H. and T.H. on behalf of J.H. v Central Regional Board of Education, EDS 11713-12, Final Decision (September 4, 2012), <http://njlaw.rutgers.edu/collections/oal/>. M.H. and B.H. on behalf of G.H. v Jackson Township Bd. of Educ., 2010 N.J. Agen LEXIS 324 (July 19, 2010). The Federal statutes and regulations upon which our local regulatory scheme is based are in accord. The IDEA's discussion of due process procedures provides for the maintenance of current educational placements "during the pendency of any proceedings conducted pursuant to this section." 20 U.S.C. § 1415(j). (emphasis supplied). Federal regulations likewise emphasize that a formal proceeding is a prerequisite to the invocation of "stay put," stating that "during the pendency of any administrative or judicial proceeding regarding a due process complaint…the child involved in the complaint must remain in his or her current educational placement." 34 C.F.R. §300.518. (emphasis supplied).

I **CONCLUDE** that the parties' agreement that Sinai will be the "stay put" placement if they "do not agree as to placement for the 2014-15 school year," required that the parents formalize any such disagreement through a timely filing for due process or mediation. Simply put, the relevant statutes and regulations confirm that in the special education context, "not agreeing" to a placement for purposes of invoking "stay put" means filing for due process or mediation. The parents never did so. I thus **CONCLUDE** that the Board is under no present further obligation to fund J.G.'s placement at Sinai. The IEP presented in February 2014 went unchallenged, and is thus the IEP currently in effect.

The course of conduct by the parents serves to emphasize the policy considerations that require this result. By not promptly filing for due process, they led the CST to mistakenly believe that they had an earnest interest in a placement other than Sinai, and the opportunity to settle J.G.'s placement for 2014-2015 prior to the start of the school year was lost. Indeed, based on its mistaken assumption that an

alternative placement remained a possibility, the Board filed for due process to compel the family's cooperation with the intake process; as late as April 27, 2014, counsel for respondents advised that his clients were indeed willing to visit proposed alternative placements and that there must be "some misunderstanding." It was not until June 2014 that the family obtained and shared medical opinions that such visits to alternative schools could damage J.G. emotionally.

The Board's amended petition seeking an order directing that J.G. participate in intakes at various schools followed. But as I have indicated informally to counsel, and as I continue to maintain, the issue of attending intake sessions is a "red herring." The real and overarching issue here concerns which school placement is appropriate for J.G., and at whose expense. If his parents feel that Sinai is the appropriate placement for him, they can educate him there privately or do what they ought to have done many months ago; that is, file a petition for due process seeking to continue his placement there at Board expense. Alternatively, they can present their son for intakes at the alternative school programs proposed by the CST. But I will not compel them to do so if they feel J.G. would be harmed emotionally by school visits, and accordingly, I **CONCLUDE** that the remaining claims raised by the Board's petition must be dismissed.

Finally, respondents urge that, upon the filing of this petition for due process by the Board, "stay put" went into effect and that on this additional basis they are entitled to placement at Sinai at Board expense for the remainder of the 2014-2015 school year. This argument is a nonstarter. "Stay put" maintains the status quo only while a formal due process petition is pending. Accordingly, respondents' contention that "stay put" must be invoked regardless which party files for due process requires no discussion or analysis under the facts presented here. "Stay put" was invoked upon the filing of the Board's petition for due process, because the Board has continued to fund the Sinai placement to date, pending my decision in this matter.

ORDER

Based on the foregoing, the petition for due process is **GRANTED,** in part. The Board is relieved of its obligation to fund J.G.'s program at the Sinai School. This decision is entered without prejudice to the family's right to file a petition for due process asserting that J.G. should remain at Sinai at Board expense for the 2014-2015 school year. The remaining claims raised by the petition are **DISMISSED**. The telephone conference scheduled for **November 5, 2014**, is unnecessary as a result, and is adjourned.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2010) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2010). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education.

October 1, 2014

DATE

ELLEN S. BASS, ALJ

Date Mailed to Parties: